

BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition
to Revoke Probation Against:

FRANK J. PERRY,

Respiratory Care Practitioner No. 22674

Respondent.

Case No. R-2013

OAH No. N2006030201

PROPOSED DECISION

On April 10, 2006, in Oakland, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter.

Catherine E. Santillan, Senior Legal Analyst, represented Complainant Stephanie Nunez.

The record was held open to afford an opportunity to Complainant to file with OAH and to serve on Respondent Frank J. Perry a revised certificate of licensure that would reflect a period of licensed status of Respondent Frank J. Perry that was not shown on the certificate that was presented at the hearing of this matter. On April 14, 2006, OAH received the corrected certificate of licensure, dated April 11, 2006, which was marked as exhibit "2 b," and received in evidence.

On April 14, 2006, the parties were deemed to have submitted the matter, and the record closed.

FACTUAL FINDINGS

1. On June 21, 1985, the Respiratory Care Board of California (the Board) issued respiratory care practitioner license number 5377 to Frank J. Perry (Respondent). Respondent renewed the license on August 9, 1988, on August 14, 1990, and again on July 6, 1992. On August 31, 1994, the license expired and Respondent did not renew the license. On September 7, 1997, the Board cancelled

license number 5377 pursuant to California Code of Regulations, title 16, section 1399.355, subdivision (c).¹

2. On October 31, 2002, the Board issued respiratory care practitioner license number 22674 to Respondent. Respondent renewed the license on August 18, 2003, and on August 31, 2005. However, as more fully described below, effective on July 22, 2004, license number 22674 was placed on probation for a two-year period of time. Currently respiratory care practitioner license 22674 is current and valid, and it will not expire until August 31, 2007.

History of Past Disciplinary Action

3. On April 21, 2004, Complainant Stephanie Nunez, in her capacity as Executive Officer of the Board, filed an Accusation against Respondent in Case No. R-1890. The pleading alleged the following:

(I.) On or about June 20, 2003, at about 10:00 p.m., Deputy Paul Wallace from the Alameda County Sheriff's Office responded to a report of a verbal dispute between neighbors in Castro Valley. One individual was identified as respondent. Respondent's neighbor, R. K., told Deputy Wallace that respondent was being very loud that night, and he wanted respondent to quiet down. Deputy Wallace then approached respondent's residence, where he saw a vehicle backing out of the driveway. Deputy Wallace contacted the driver, who was identified as respondent. Deputy Wallace asked respondent to park his vehicle and discuss the matter with him. As Deputy Wallace spoke to respondent, he observed that respondent's nose was runny, the inside and outer portion of his left nostril were red, his lips were dry and cracked. Deputy Wallace asked if respondent was using any prescription medications. Respondent stated that he used medication for asthma. He denied using illegal drugs. Deputy Wallace asked respondent to perform field sobriety tests. Respondent's performance was poor. Deputy Wallace measured respondent's pulse rate at 130 beats per minute, and measured respondent's pupil size at 2.0 millimeters. Based on Deputy Wallace's observations, training and experience, he placed respondent under arrest for violating Health and Safety Code section 11550 (under the influence of drugs.)

¹ California Code of Regulations, title 16, section 1399.355, subdivision (c), states: "After a license has been expired for three years, it will be cancelled and the applicant must make application just as for an initial license and meet all the current criteria required for licensure."

(II.) Respondent provided [the Sheriff's Department] a urine sample that was positive for amphetamine and methamphetamine.

4. Petitioner's conduct, on June 20, 2003, as alleged in the Accusation set out cause for discipline against Respondent under Business and Professions Code section 3750.5, subdivision (b) (Use of a Controlled Substance).

5. On May 25, 2004, with the advice and approval of his attorney (Deborah Phillips, Esquire), Respondent entered into a Stipulated Settlement and Disciplinary Order in Board case number R-1890 (stipulated settlement agreement). In the stipulated settlement agreement, Respondent admitted to the truth of each and every charge and allegation in the Accusation and he agreed to subject his respiratory care practitioner license to discipline.

Pursuant to the stipulated settlement agreement, Respondent accepted discipline in the way of a stay of revocation of respiratory care practitioner license number 22674, and he accepted a period of probation of two (2) years under certain terms and conditions.

The probation included, among other things, requirements that Respondent: (i) submit to biological fluid testing; (ii) abstain from use of any and all mood altering substances, except when drugs are lawfully prescribed by a licensed health care practitioner; (iii) obey all laws; (iv) make quarterly reports of compliance with the terms and conditions of probation; (v) maintain employment as a respiratory care practitioner; and (vi) notify the Board of any changes in his employment or address of his residence.

6. On July 12, 2004, the Board adopted as a Decision and Order the terms of the stipulation. On July 22, 2004, the Board's Decision and Order became effective. Hence, the two-year period of probation was set to terminate on or about July 22, 2006.

Respondent's Violation of Terms of Probation

a. Positive Drug Test Results

7. Mr. Kevin Masuda, a probation monitor for the Board (Mr. Masuda), came to the hearing of this matter. He offered credible and persuasive evidence.

8. On August 24, 2004, in the capacity of a probation monitor for the Board, Mr. Masuda met with Respondent. During the course of the meeting, Mr. Masuda obtained Respondent's signature on a Board form titled, "State of Understanding – Drug/Alcohol Testing Program." Also, Mr. Masuda observed Respondent sign a document titled, "Drug/Alcohol Testing Program," which

summarized the scope of the drug testing program that the terms and conditions of probation imposed upon Respondent.

And during the meeting in August 2004, Mr. Masuda instructed Respondent regarding the terms and conditions of probation that required he contract with Compass Vision, Inc. (CVI), which would perform random drug testing through a process of collecting and analyzing biological fluids. Respondent's participation in the CVI program required him on a daily basis to telephone on a computerized system, to enter a PIN number, and to listen for instructions regarding whether Respondent had been selected to give on a particular date a urine sample at a CVI approved facility.

9. On September 6, 2005, in response to notice of his selection, Respondent provided a urine sample to CVI. CVI determined that the urine sample of Respondent was positive for amphetamine. The level of the illegal drug in Respondent's system was at 500 nanograms per milliliter.

10. On September 30, 2005, Mr. Masuda received a telephone call from Respondent. During the telephone call, Respondent made an admission to the probation monitor that he had obtained and used methamphetamine before CVI administered the drug test on September 6, 2005. Respondent declared that he had failed to abstain from ingesting methamphetamine during the period of probation.

11. On December 23, 2005, CVI notified Respondent of another date for testing of a urine sample from him. Respondent failed to appear for the drug test following the notice on December 23, 2005.

12. On December 30, 2005, Respondent gave CVI a urine sample for testing. CVI determined that the urine sample of Respondent was positive for amphetamine. The level of the illegal drug in Respondent's system was at 760 nanograms per milliliter. (For the test results on December 30, 2005, Respondent had submitted to providing a urine sample even though he had not been notified by the CVI computerized selection process.)

13. On January 26, 2006, CVI selected Respondent to provide a urine sample for drug testing purposes. Respondent telephoned Mr. Masuda to convey that on that date he could not afford the \$33 fee to take the CVI test. Respondent failed to appear for the drug test.

b. False Statement in Compliance Report

14. On September 21, 2005, Respondent completed the Board's form titled, "Quarterly Report of Compliance." The form pertained to the period from July 1, 2005, through September 21, 2005. (However, the form had contemplated September 30, 2005, as the final date in the reporting period.) Under penalty of perjury that all

answers and responses were true and correct, Respondent answered “yes,” to the question, “Have you complied with every term and condition of your probation?” Respondent’s response was false. At the time Respondent completed the questionnaire, he had violated Probation Condition 3² because he had tested positive for ingestion of amphetamine and he had made an admission to the Board’s probation monitor that he has consumed methamphetamine before CVI tested his urine sample around September 6, 2005.

15. On January 15, 2006, Respondent completed the Board’s form titled “Drug Questionnaire.” Respondent answered “no,” to the question “In the last [three] months, have you illegally used or ingested drugs and/or narcotics?” Respondent’s response was false. On December 30, 2005, CVI had determined that Respondent’s urine sample was positive for amphetamine.

16. Respondent’s false statement on the Board’s Drug Questionnaire showed Respondent’s fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions and duties of a respiratory care practitioner.

Matters in Aggravation

17. At the hearing of this matter, Respondent made an admission that during the period of probation he tested positive for amphetamine on two separate occasions.

18. During the period of probation, Respondent provided the Board with no indication that he had been employed as a respiratory care practitioner.

19. Condition 9 of the stipulated agreement provides “Respondent shall be employed a minimum of 24 hours per week as a respiratory care practitioner for a minimum of 2/3 of his probation period. . . .”

² Condition 3 in the Stipulated Settlement and Disciplinary Order provides, in pertinent part:

Respondent shall completely abstain from the possession or use of alcohol, any and all mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. . . . Respondent shall ensure that he is not in the presence of or in the same physical location as individuals who are using illegal substances, even if Respondent is not personally ingesting the drug(s). . . . Any positive results that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent’s probationary respiratory care practitioner license. . . .

20. During the two-year period of probation, which began on July 22, 2004, Respondent was not employed as a respiratory care practitioner beyond December 2004.

Respondent recalls that the last time that he worked in the profession occurred when he worked at the San Leandro Community Hospital. He believes that he last worked in a part-time position at the hospital in December 2004. Respondent believes that he worked at San Leandro Community Hospital for six months. Respondent states that he was discharged from the part-time job as a respiratory therapist because his skills were “not up to par.” Before securing the part-time job at San Leandro Community Hospital, Respondent had not worked as a respiratory therapist in ten years.

21. Respondent never reported on Board compliance reports that he had been employed at San Leandro Community Hospital as a respiratory therapist.

Respondent's Background

22. After the Board first issued a license to him on June 21, 1985, Respondent worked in Los Angeles at a Kaiser Permanente hospital. He worked for Kaiser from 1987 until 1992.

23. In 1992 Respondent resigned his respiratory therapist position with Kaiser in order to begin a business called “Taylor Rental.” He owned and operated the business, which engaged in renting trucks and trailers. The business was located in Castro Valley. After 10 years of business, Respondent sold the truck and trailer rental business to a large corporation.

When he sold the rental company in 2002, Respondent reapplied for licensed status and the Board issued him license number 22674.

24. During the entire period of probation, Respondent has lived alone. However he has friends and acquaintances near his home in Castro Valley.

Matters in Rehabilitation

25. Respondent contends that the Board did not mandate rehabilitation as part of the probation. Accordingly, he avers he has set out to rehabilitate himself.

26. In October 2005, Respondent enrolled in the out-patient drug and alcohol treatment and counseling program called “Second Chance,” which is located on “B” Street in downtown Hayward.

As of the date of the hearing, Respondent continued to participate in counseling by going to sessions four times per week. A group therapy session spans

ninety minutes. Respondent regularly meets with a counselor named Patty Hart, who is the manager or supervisor of Second Chance.

Although Second Chance has facilities for drug testing, Respondent has never submitted to drug testing through that organization.

27. Respondent attends meetings of Alcoholics Anonymous through the Triangle Fellowship, which is located on Mission Boulevard in Hayward. Respondent goes to AA meetings on average of two per week. Respondent recalls that he first attended AA meetings in 2005. Respondent has a sponsor at the AA meetings. At the hearing of this matter, Respondent proclaimed that he has progressed through all twelve steps of the AA behavior modification counseling program.

28. Currently Respondent has been looking for “any kind of work.” He has focused his job search through Home Depot and “places like that.” But he has not turned to any private job counselor or public office of EDD (Employment Development Department) for assistance in securing an employment opportunity.

29. Over the period of five years before the date of the hearing in this matter, Respondent has taken two review courses in respiratory care at Ohlone Community College in Alameda County.

Other Matters

30. Respondent takes prescription medications. The medications that Respondent takes are Seroquel, haloperidol, and Klonopin. The medications are prescribed by Dr. Boone and Dr. Naim, who are both affiliated with Schuman-Liles Clinic on MacArthur Boulevard in Oakland. Respondent views Dr. Naim as his primary psychiatrist, who first began to treat Respondent in June 2005. (Currently, Respondent sees Dr. Naim twice each month. In total, Respondent has only treated with Dr. Boone on four separate dates, which were occasions when Dr. Naim was not in the clinic.)

Respondent claimed at the hearing of this matter that he does not know the medical or emotional condition that requires him to take the medications. But on the Board’s Drug Questionnaire, Respondent set out the purpose for taking the medication Seroquel for “Schizophrenia.” (Respondent stated that he researched on his computer the use of Seroquel to treat Schizophrenia; however, he believes that none of his treating physicians has ever told him the reason for the three medications that are prescribed to him.)

31. At the hearing of this matter, Respondent offered the letter, dated April 6, 2006, by Leslie Valas, a licensed Marriage & Family Therapist. Respondent sees Ms. Valas on a weekly basis. Respondent began psychotherapy with Ms. Valas in

September 2005. Ms. Valas' letter expresses that Respondent "has been a willing participant in therapy and [he] is making efforts to improve all aspects of his life." The letter indicates Respondent will continue with psychotherapy "for the foreseeable future."

Costs of Prosecution

32. The Certification of Costs, authored by Senior Legal Analyst Catherine Santillian, certified that as of April 6, 2006, the following costs were incurred in connection with the investigation and prosecution of the complaint that led to the Accusation and Petition to Revoke Probation against Respondent.

Attorney General [Department of Justice]:

Senior Legal Analyst 36 hours at \$92.00 per hour	\$3,312
TOTAL Costs of Investigation and Prosecution	
incurred through the date of certification.....	\$3,312

33. Respondent did not provide competent evidence that Complainant's certification of costs of investigation and prosecution are unreasonable. Respondent made no objection to Complainant's request for recovery of costs. Accordingly, as of the date of the hearing, the reasonable cost owed by Respondent to the Board was \$3,312.

LEGAL CONCLUSIONS

1. Business and Professions Code section 3718 provides that "the board shall . . . suspend and revoke licenses to practice respiratory care as provided in [Chapter 8.3 of the Business and Professions Code].

Business and Professions Code section 3750 establishes, "[t]he board may order . . . suspension or revocation of . . . a license issued under [Chapter 8.3 of the Business and Professions Code] for any of the following causes:

(g) . . . violating, or attempting to violate . . . any provision or term of [Chapter 8.3 of the Business and Professions Code] or any provision of Division 2 (commencing with Section 500).

...

(j) The commission of any fraudulent, dishonest, or corrupt act which is substantially related to the

qualifications, functions, or duties of a respiratory care practitioner.”

2. Business and Professions Code section 3750.5, states that “In addition to any other grounds specified in [Chapter 8.3 of the Business and Professions Code], the board may . . . suspend, or revoke the license of any . . . license holder who has done any of the following:

(a) Obtained or possessed in violation of law, or except as directed by a licensed physician and surgeon, dentist, or podiatrist administered to himself . . . any controlled substances . . . or any dangerous drug

(b) Used any controlled substance . . . or any dangerous drug. . . .

3. Cause to revoke probation in this matter exists pursuant to Business section 3718 and 3750, subdivision (g), as they interact with section 3750.5, subdivision (a), by reason of the matter set out in Factual Finding 10.

4. Cause to revoke probation in this matter exists pursuant to Business section 3718 and 3750, subdivision (g), as they interact with section 3750.5, subdivision (b), by reason of the matter set out in Factual Findings 9 and 12.

5. Cause to revoke probation in this matter exists pursuant to Business sections 3718 and 3750, subdivision (j), by reason of the matter set out in Factual Findings 14 through 16 inclusive.

6. Respondent’s acts and omissions in involved serious misconduct for a licensed health care provider. While his respiratory care practitioner’s license was on probation he engaged in the unlawful use of amphetamine ingestion. Moreover he made false statements on the Board’s questionnaire regarding his unlawful drug use.

Respondent offered no corroborating evidence from fellow respiratory care practitioners or other health care providers that Respondent has maintained a good reputation for truthfulness and lawful behavior.

By the weight of evidence, it would not be consistent with the public interest for Respondent to hold a respiratory care practitioner license, even on a probationary basis.

7. Complainant has requested that Respondent Frank J. Perry be ordered to pay the Board its costs of investigation and prosecution.

Business and Professions Code section 3753.5, subdivision (a) prescribes:

In any order issued in resolution of a disciplinary proceeding before the board, the board or the administrative law judge may direct any practitioner or applicant found to have committed a violation or violations of law to pay to the board a sum not to exceed the costs of the investigation and prosecution of the case. A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the official custodian of the record or his or her designated representative shall be prima facie evidence of the actual costs of the investigation and prosecution of the case.

The cost of prosecution of the case as set out in Factual Finding 33 is reasonable. The reasonable cost of prosecution as set forth in Finding 32 amounts to a total of \$3,312.

Respondent Frank J. Perry is liable for the total amount of the cost of prosecution of the case.

ORDER

1. The Accusation and Petition to Revoke Probation against Respondent Frank J. Perry is sustained, by reason of Legal Conclusions 3, 4 and 5, separately and jointly.
2. The probation granted, effective July 22, 2004, by the Respiratory Care Board under Accusation number R-1890 is rescinded. The disciplinary order that was stayed is now imposed.
3. Respiratory care practitioner license number 22674, issued to Frank J. Perry, is revoked, by reason of Legal Conclusions 3, 4 and 5, separately and jointly.
4. Within thirty (30) days after the effective date of this decision by the Board, Respondent Frank J. Perry, shall pay the full measure of the costs of prosecution of this matter, as authorized by Business and Professions Code section 3753.5, which is deemed to be to \$3,312.

DATED: April 24, 2006

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
State of California